

RECEIPT NUMBER 0.00
 TRACKING NUMBER 73388796 MTA

CAUSE NUMBER 201743001

PLAINTIFF: BALFOUR BEATTY CONSTRUCTION LLC
 vs.
 DEFENDANT: LIBERTY MUTUAL INSURANCE COMPANY

In The 129th
 Judicial District Court of
 Harris County, Texas

CITATION CORPORATE

THE STATE OF TEXAS
 County of Harris

TO: LIBERTY MUTUAL INSURANCE COMPANY (A CORPORATION) BY SERVING ITS
 REGISTERED AGENT FOR SERVICE CORPORATION SERVICE COMPANY
 212 EAST 7TH STREET SUITE 620 AUSTIN TX 78701 - 3218

Attached is a copy of PLAINTIFFS' ORIGINAL PETITION.

This instrument was filed on the 28th day of June, 2017, in the
 above cited cause number and court. The instrument attached describes the claim against you.

YOU HAVE BEEN SUED; you may employ an attorney. If you or your attorney do not file a written answer with the
 District Clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of 20 days after you were
 served this citation and petition, a default judgment may be taken against you.

TO OFFICER SERVING:

This Citation was issued under my hand and seal of said Court, at Houston, Texas, this 28th day of
June, 2017.

Issued at request of:
 COOPER, R. BRENT
 900 JACKSON STE100
 DALLAS, TX 75202
 TEL: (214) 712-9500
 Bar Number: 4783250



Chris Daniel
 CHRIS DANIEL, District Clerk
 Harris County, Texas
 201 Caroline, Houston, Texas 77002
 P.O. Box 4651, Houston, Texas 77210

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OFFICER/AUTHORIZED PERSON RETURN

I received this citation on the 12th day of July, 2017, at 4:30 o'clock P.M., endorsed
 the date of delivery thereon, and executed it at _____

in _____ County, Texas on the _____ day of _____, 20____, at _____ o'clock ____M.,

by delivering to _____, by delivering to its

_____, in person, whose name is _____

a true copy of this citation, with a copy of the _____ Petition attached,

and with accompanying copies of _____

I certify that the facts stated in this return are true by my signature below on the _____ day of _____, 20____.

FEE: \$ _____

By: _____
 (SIGNATURE OF OFFICER)

Printed Name: _____

Affiant Other Than Officer _____
 As Deputy for: _____
 (PRINTED NAME & TITLE OF SHERIFF OR CONSTABLE)

On this day, _____, known to me to be the person whose signature
 appears on the foregoing return, personally appeared. After being by me duly sworn, he/she stated that this citation was
 executed by him/her in the exact manner recited on the return.

SWORN TO AND SUBSCRIBED BEFORE ME, on this _____ day of _____, 20____

Notary Public

RETURN OF SERVICE

Cause No. 201743001

In the 129th Judicial District Court of
Harris County, Texas

BALFOUR BEATTY
CONSTRUCTION, LLC,
et al

Plaintiff

V.

LIBERTY MUTUAL
INSURANCE COMPANY
Defendant

Came to hand on July 12, 2017, at 04:30 PM.

Executed at 211 E 7th Street, Suite 620, Austin, TX 78701, within the County of Travis at 11:10 AM on July 13, 2017, by delivering to the within named:

LIBERTY MUTUAL INSURANCE COMPANY,

by delivering to its Registered Agent, CORPORATION SERVICE COMPANY, by and through its designated agent, SUE VERTREES, a true copy of this Citation together with Plaintiff's Original Petition, having first endorsed upon such copy of such process the date of delivery.

I certify that I am approved by the Supreme Court of Texas, Misc. Docket No. 05-9122 under rule 103, 501 and 501.2 of the TRCP to deliver citations and other notices from any District, County, and Justice Courts in and for the State of Texas. I am competent to make this oath; I am not less than 18 years of age, I am not a party to the aboverelated cause, I have not been convicted of a felony or a crime involving moral turpitude, and I am not interested in the outcome of the aboverelated cause.

By: *Thomas R. Kroll*
Thomas R. Kroll SCH-3012,
Exp: 8/31/2019

VERIFICATION

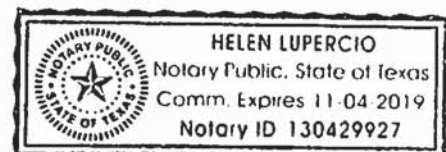
STATE OF TEXAS §
COUNTY OF TRAVIS §

BEFORE ME, A NOTARY PUBLIC, on this day personally appeared Thomas R. Kroll, known to me to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this July 14, 2017.

Helen Lupericio
NOTARY PUBLIC, STATE OF TEXAS

17-027514/192-0474



2017-43001 / Court: 129

CAUSE NO. _____

**BALFOUR BEATTY
CONSTRUCTION, LLC, and
MILESTONE METALS, INC.****Plaintiffs,****v.****LIBERTY MUTUAL INSURANCE
COMPANY,****Defendants.**§
§
§
§
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§
§
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§**IN THE DISTRICT COURT OF****HARRIS COUNTY, TEXAS****_____ JUDICIAL DISTRICT**

PLAINTIFFS' ORIGINAL PETITION

COMES NOW, Plaintiffs Balfour Beatty Construction, LLC ("Balfour Beatty"), and Milestone Metals, Inc. ("Milestone") file this their Original Petition against Liberty Mutual Insurance Company ("Liberty Mutual"), and in support thereof will show the Court as follows:

I.**JURISDICTION, PARTIES AND VENUE**

1. Plaintiff Balfour Beatty Construction, LLC is incorporated in the State of Texas with its principal place of business located in Houston, Texas.
2. Plaintiff Milestone Metals, Inc. is incorporated in the State of Texas with its principal place of business located in Houston, Texas.
3. Defendant Liberty Mutual Insurance Company is a corporation duly formed and existing under the laws of the State of Massachusetts, with its principal place of business located in Boston, Massachusetts. Liberty Mutual may be served with process by delivering a copy of the Citation, together with Plaintiffs' Original Petition to its registered agent for service Corporation Service Company, 212 East 7th Street, Suite 620, Austin, Texas 78701-3218.

4. This Court has jurisdiction over this matter because (a) Liberty Mutual failed and refused to pay a claim presented under a builder's risk policy despite clear liability for same; and (b) the amount in controversy exceeds the minimum jurisdictional limits of the Court.

5. Venue is proper in Harris County because the insurance policy in dispute was issued in, and covered a risk located in Harris County, Texas.

II. **DISCOVERY**

6. Discovery in this case will be conducted under Level III pursuant to Tex. R. Civ. Pro. 190.4.

III. **FACTS**

7. On July 3, 2014, Balfour Beatty entered into a contract with TCH Energy Corridor Venture, LLC ("Trammel Crow") for the construction of a project known as the Energy Center 5, in Houston, Texas (the "Project"). Trammel Crow was the developer of the Project. Balfour Beatty acted as the general contractor.

8. Balfour Beatty entered into a subcontract agreement with Milestone, dated August 17, 2014, for the erection of the "structural steel, steel joists, deck, stairs, miscellaneous metals (furnished and erected), and ornamental metals" on the Project. During construction a number of windows installed by another subcontractor were damaged as a result of slag generated by Milestone's welding operations.

9. Pursuant to the primary contract, Trammel Crow procured a Builder's Risk Policy, number YM2-L9L-430125-084 from Liberty Mutual specifically designed to insure the Project (the "Policy"). Trammel Crow, Balfour Beatty and Milestone are insured under the Policy. The Policy contains the following Insuring Agreement:

PERILS COVERED

“We” cover risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded.

10. Trammel Crow, Balfour Beatty and Milestone presented claims to Liberty Mutual under the Policy for the loss and damage sustained on or about May 10, 2016. Said claim was in the amount of \$686,976.00. Liberty Mutual systematically denied the claims of each of these Additional Insureds on the basis of the following Policy exclusion:

PERILS EXCLUDED

2. “We” do not pay for loss or damage that is **caused by or results from** one or more the following:

c. Defects, Errors, And Omissions –

1) “we” do not pay for loss or damage **consisting of, caused by, or resulting from** an act, defect, error, or omission (negligent or not), relating to:

- a) design, specifications, **construction**, materials, or **workmanship**;
- b) planning, zoning, development, siting, surveying, grading or compaction; or
- c) maintenance, **installation**, renovation, remodeling, or repair.

But if an act, defect, error, or omission as described above results in a covered peril, “we” do cover the loss or damage caused by that covered peril.

2) This exclusion applies regardless of whether or not the act, defect, error, or omission:

- a) originated at a covered “building or structure”; or
- b) was being performed at “your” request for “your” benefit.

11. The Policy unambiguously states that the Defects Errors and Omissions Exclusion does not apply to resultant damage that is otherwise a Covered Peril under the Policy. Direct physical loss of property is a Covered Peril within the meaning of the Insuring Agreement.

Texas law is *abundantly clear* that the Defects Errors and Omissions Exclusion only applies to the cost to repair or replace defective work. *Collinsworth v. AIG Life Insurance Co.*, 404 F.Supp.2d 911 (N.D. Tex. 2005); *North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829 (Tex.App.-Houston [1st Dist. 1996], no pet.); *Dow Chemical Co. v. Royal Indemn. Co.*, 635 F.2d 379 (5th Cir. 1981); *U.S. Industries, Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459 (5th Cir. 1982); *CenterPoint Energy, Inc. v. Associated Elec. & Gas Svcs., Ltd.*, 2010 WL 11468795 (S.D. Tex., Sept. 2, 2010); *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000); *National Fire Ins. Co. of Pittsburgh, PA v. Valero Energy Corp.*, 777 S.W.2d 501 (Tex. App. – Corpus Christi, 1989, pet. denied).

12. Nevertheless, Liberty Mutual has failed and refused to and continues to fail and refuse to honor the terms of the Policy.

IV.
COUNT ONE – BREACH OF CONTRACT

13. Liberty Mutual breached the terms of the Policy by failing and refusing to pay. Balfour Beatty and Milestone have been damaged by Liberty Mutual's wrongful and erroneous conduct.

V.
COUNT TWO – VIOLATION OF TEXAS INSURANCE CODE § 541.060

14. Liberty Mutual's conduct, as more fully described above, constitutes a violation of the Texas Insurance Code, § 541.060 *et seq.*, or the Unfair Settlement Practices Act by engaging in one or more of the following prohibited acts:

- a. Misrepresenting to a claimant a material fact or policy provision relating to coverage at issue. TEX. INS. CODE § 541.060 (a)(1) & TEX. INS. CODE § 542.002 (b)(1); and
- b. Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's

liability has become reasonably clear. TEX. INS. CODE § 541.060 (a)(2)(A) & TEX. INS. CODE § 542.002 (b)(1).

15. Liberty Mutual's conduct was done knowingly within the meaning of Tex. Ins. Code § 541.002(1). As a result of its actions, Liberty Mutual is subject to statutory penalties, including treble damages pursuant to Tex. Ins. Code § 541.152(b).

16. Balfour Beatty and Milestone have been damaged by Liberty Mutual's conduct as set forth more fully above.

VI.

COUNT TWO – VIOLATION OF TEXAS INSURANCE CODE § 542.051

17. Liberty Mutual has violated Texas Insurance Code § 542.051 *et seq.*, or the Prompt Payment Act by failing to pay the claim when liability became reasonably clear. Additionally, Liberty Mutual's continued delay in paying the claim after receiving all items, statements, and forms reasonably requested and required under Section 542.055 for more than 60 days is a violation of Tex. Ins. Code § 542.058(a).

18. These violations of the Prompt Payment Act subject Liberty Mutual to an 18% statutory penalty and reasonable attorneys' fees, which will continue to accrue until the claim is fully paid by Liberty Mutual. Tex. Ins. Code § 542.060(a).

VII.

ATTORNEY'S FEES

19. In addition, Balfour Beatty and Milestone are entitled to recover attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001.

VIII.

PRAYER

20. For the reasons stated, Plaintiffs Balfour Beatty and Milestone pray that Defendant Liberty Mutual be cited to appear herein and that upon trial of this case, the Court

award Plaintiffs (a) actual compensatory damages; (b) treble damages; (c) penalties under the Texas Insurance Code; (d) exemplary damages; (e) attorney's fees, and all such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ R. Brent Cooper

R. BRENT COOPER

Texas Bar No. 04783250

TARRON L. GARTNER-ILAI

Texas Bar No. 18686175

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**ATTORNEYS FOR PLAINTIFFS BALFOUR
BEATTY CONSTRUCTION, LLC AND
MILESTONE METALS, INC.**